United States Court of Appeals

for the Second Circuit

APPENDIX

76-2030

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILFRED JOHNSON,

Appellant,

-against-

ROY BOMBARD, Superintendent,
Green Haven Correctional Facility,

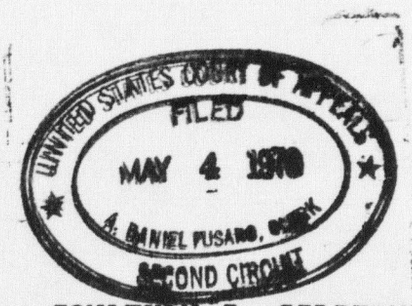
Appellee.

Docket No. 76-2030

B
P/S

APPENDIX FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



JONATHAN J. SILBERMANN
Of Counsel

WILLIAM J. GALLAGHER, ESQ.
THE LEGAL AID SOCIETY
Attorney for Appellant
WILFRED JOHNSON
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

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PLAINTIFFS

JOHNSON, Wilfred, etc.

UNITED STATES OF AMERICA, ex rel.
WILFRED JOHNSON

DEFENDANTS

WARDEN, Green Haven, etc.

WARDEN, GREEN HAVEN CORRECTIONAL FACILITY, NEW YORK, NEW YORK

APPEAL

PRO SE APPLICATION
under General Rule 26(e)

CAUSE

HABEAS CORPUS

Related cases: 71CR-323, 65CR-503 63CR-480

ATTORNEYS

For PLAINTIFF:
Wilfred Johnson, Pro Se
Box B
Stormville N.Y.

76-7030

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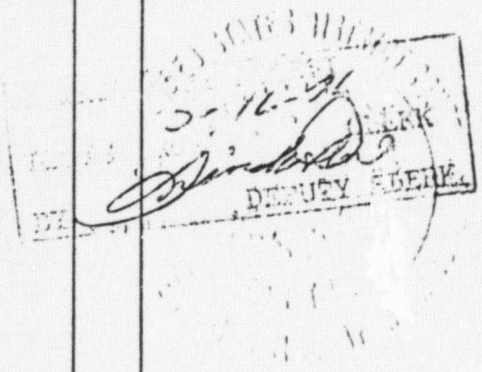
75 1805 USA ex rel WILFRED JOHNSON vs. WARDEN, GREENHAVEN, etc.

DATE	NR.	PROCEEDINGS
10-29-75		Application for writ of habeas corpus filed. (1)
11-10-75		By RAYFIEL,J.-Order dtd 11-10-75 dismissing the petition filed. (2)
11-12-75		JUDGMENT dtd 11-12-75 dismissing complaint filed. (3)
11-12-75		Notice of appeal filed. Duplicate mailed to parties & C of A. (4)
12-12-75		By RAYFIEL, J-Order dtd 12-12-75 granting the motion for petitioner for leave to prosecute his appeal pro se. The motion for a certificate of probable cause is granted. Copy of order mailed to petitioner. (5)



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, ex rel.
WILFRED JOHNSON,

Relator,

- against -

WARDEN, GREEN HAVEN CORRECTIONAL
FACILITY, NEW YORK, NEW YORK,

Respondent.

- - - - - - - - - - - - - - - - - - - -x

75 C 1805

RAYFIEL, J.

The relator's petition contains allegations to the effect that he was convicted after a jury trial of the crimes of robbery, first degree, and two counts of grand larceny, third degree, in the New York State Supreme Court, and was sentenced to ten years' imprisonment; that on appeal the judgment of conviction was affirmed by the Appellate Division, Second Department, on June 24, 1974; and that the New York State Court of Appeals denied him leave to appeal.

Relator contends, first, that the identification procedures leading to his conviction constituted a denial of due process. Relator's wife testified that each of

relator's ten fingers was tattooed. Relator was identified by two witnesses, both of whom testified that they had ample opportunity to observe the relator's hands, but saw no tattoos. Further, relator points out that both identifying witnesses made pretrial identifications from photographs, and that the witnesses "were completely uncertain" in their identification of the photographs. He contends that the police "made alterations of defendant's appearance in the presence of witnesses", and that he "was given phrases to repeat".

Relator's contentions regarding the claimed illegality and inadequacy of identification evidence and procedures "present evidentiary questions which do not rise to the significance of constitutional violations". Gant v. Kropp, 407 F.2d 776, cert. denied, 395 U.S. 916; Judy v. Pepersack, 284 F.2d 443, cert. denied, 366 U.S. 939; Sempsrott v. Coiner, 308 F.Supp. 1217.

There is no merit in relator's contention that he has been denied due process because the identification witnesses testified that they did not see the tattoos on his hands. This contention goes to the credibility of witnesses at the trial, and the weight to be given to their testimony,

and is therefore no ground for federal habeas corpus relief. Trujillo v. Tinsley, 333 F.2d 185; United States ex rel. Rooney v. Ragen, 173 F.2d 668, cert. denied, 337 U.S. 961; United States ex rel. Griffin v. Vincent, 359 F.Supp. 1072.

Relator further contends that he was deprived of due process by prejudicial comment of the prosecutor in his summation, during the course of which he said to the jury, "Look at the defendant, judge for yourself, get the aura of arrogance of this defendant". Defense counsel's objection was overruled, whereupon the prosecutor stated further, "Look at this defendant. See the aura, the absolute aura of arrogance."

In a state prosecution, the charge was felony murder arising out of an allegedly wilful and malicious burning of a tavern, which resulted in six deaths. The prosecutor, in his summation, commenting on testimony to the effect that a prosecution witness had stated that she hoped the guilty persons would get the gas chamber, said, "I wish I had a dollar for every person in this community that did not know anyone that died there, did not even know where the place was; that when they saw it in the paper, made the same

utterance that those who did it should die". On an application to the federal court for habeas corpus, it was held, as to the prosecutor's remarks, that "no prejudice resulted which has constitutional significance. It is only where criminal trials in state courts are conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice that due process is offended and that federal court interference is warranted. Lisenba v. People of State of California, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166." Chavez v. Dickson, 280 F.2d 727, 735, cert. denied, 364 U.S. 934. To similar effect, see United States ex rel. James v. Follette, 301 F.Supp. 569, aff'd, 431 F.2d 708, (2d Cir.), cert. denied, 401 U.S. 979; United States ex rel. Haynes v. McKendrick, 350 F.Supp. 990, aff'd, 480 F.2d 1021 (2d Cir.).

The challenged remarks of the prosecutor, at bar, were not prejudicial to the extent that they constituted a denial of due process, or deprivation of a fair trial.

All of the cases cited by relator have been examined. None warrants favorable consideration of relator's petition. One of the cases cited by relator is authority

against him. In that case, at a state court trial, the prosecutor, in his summation, referred to the "petitioner as a 'big ape' and a 'gorilla'". It was held "that the error was slight and could not have affected the overall fairness of the trial and did not attain constitutional proportions. Eaton v. United States, (5th Cir.) 390 F.2d 485, 486 (1968), cert. denied, 393 U.S. 937, 89 S.Ct. 299, 21 L.Ed.273; Poulson v. Turner, (10th Cir.) 359 F.2d 588, 581 (1966), cert. denied, 385 U.S. 905, 87 S.Ct. 219, 17 L.Ed.2d 136; United States ex rel. Castillo v. Fay, (2d Cir.) 350 F.2d 400, 401 (1965), cert. denied, 382 U.S. 1019, 86 S.Ct. 637, 15 L. Ed.2d 533 (1966)." Downie v. Burke, 408 F.2d 343, cert. denied, 395 U.S. 940.

Relator has failed to establish his right to relief herein. Accordingly, the petition is dismissed.

This decision constitutes an ORDER. The Clerk is directed to file a timely notice of appeal in relator's behalf.

Dated: Brooklyn, New York
November 10, 1975

U. S. D. J.

Certificate of Service

May 3, 1976

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Nathan Lieberman